

STATEMENT OF SCOPE
WISCONSIN DEPARTMENT OF HEALTH SERVICES

CHAPTER: DHS 132
RELATING TO: Nursing Home Transfer Requirements
RULE TYPE: Emergency
SCOPE TYPE: Original

FINDING OF EMERGENCY: Preservation of the public peace, health, safety, or welfare necessitates adoption of an emergency rule because nursing homes may need to transfer residents quickly within the nursing home to cohort or separate residents with and without COVID-19 to help contain the spread of the virus.

SUMMARY

1. Description of rule objectives

On March 12, 2020, Governor Evers issued Executive Order 72, which, in accordance with s. 323.10, Stats., declared a public health emergency related to COVID-19. Executive Order 72 further designated the Department of Health Services (“the department”) as the lead agency to respond to the public health emergency. The Governor directed the department to take all necessary and appropriate measures to respond to, and prevent the spread of, COVID-19 in the state—including suspending any administrative rule provisions for which strict compliance would prevent, hinder, or delay necessary actions to respond to the emergency and increase the health threat.

On April 3, 2020, Governor Evers and Secretary-designee Palm signed Emergency Order 21, which ordered the suspension of s. DHS 132.54, which requires that a patient in a nursing home be given “reasonable notice and an explanation of the reasons for the transfer.” The order suspended the notice requirement for transfers due to COVID-19 issues in order to allow nursing homes to quickly cohort patients with COVID-19 and separate them from the unaffected patient population. The Governor’s public health emergency declaration expired on May 11, 2020, per s. 323.10, Stats., and that expiration will effectively nullify Emergency Order 21.

In order to preserve the public peace, health, safety, and welfare under s. 227.24 (1) (a), Stats., and in accordance with the department’s authority under s. 252.02 (4) and (6), Stats., to promulgate rules and implement emergency measures to protect against, and control the spread of, communicable diseases, the department proposes to suspend the notice requirements in s. DHS 132.54 with respect to any transfers related to COVID-19 issues.

2. Existing policies relevant to the rule and polices proposed to be included in the rule

The current rule contains a provision that requires suspension in light of Emergency Order 21 and the continued spread of COVID-19 as this has strained a number of nursing homes. This suspension of the above-listed administrative rule will provide some flexibility for nursing homes so they can transfer residents quickly within the nursing home to cohort or separate residents with and without COVID-19 to help contain the spread of the virus.

3. Analysis of policy alternatives

There are no reasonable alternatives to emergency rulemaking. Governor Evers and Secretary-designee Palm jointly ordered that this above-referenced administrative rule be suspended on April 3, 2020 in Emergency Order 21, and that order expired on May 11, 2020.

4. Statutory authority for the rule

a. Explanation of authority to promulgate the proposed rule

The Department is authorized to promulgate the rule based upon explicit statutory language.

b. Statute/s that authorize/s the promulgation of the proposed rule

The Department is authorized to promulgate the emergency rule based upon the following statutory sections:

Section 227.11 (2) (a), Stats.: Rule-making authority is expressly conferred on an agency as follows:

(a) Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation. All of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency:

1. A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.
2. A statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.

3. A statutory provision containing a specific standard, requirement, or threshold does not confer rule-making authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.

Section 227.24 (1) (a), Stats.: An agency may, except as provided in s. 227.136 (1), promulgate rule as an emergency rule without complying with the notice, hearing, and publication requirements under this chapter if preservation of the public peace, health, safety, or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the procedures.

Section 252.02 (4) and (6), Stats.:

(4) . . . [T]he department may promulgate and enforce rules or issue orders for guarding against the introduction of any communicable disease into the state, for the control or suppression of communicable diseases, for the quarantine and disinfection of persons, localities and things infected or suspected of being infected by a communicable disease

(6) The department may authorize and implement all emergency measures necessary to control communicable diseases.

Section 49.498 (14), Stats: The department shall promulgate all of the following rules:

(a) Establishing a fair mechanism meeting the requirements of 42 USC 1396r (e) (3) and (f) (3) for hearing appeals on transfers and discharges of residents from nursing facilities.

(b) Specifying an instrument for use in performing assessments of residents under sub. (2) (c) 1. c.

(c) Establishing criteria for the denial of payment under s. 49.45 (6m) (d) 5., for the imposition of forfeitures under sub. (16) (b), for the placement of a monitor or appointment of a receiver for a facility under sub. (17) and for closure of a facility under sub. (18) that do all of the following:

1. Are consistent with federal regulations promulgated to interpret 42 USC 1396r.
2. Are designed so as to minimize the time between the identification of violations and final imposition of the penalties.
3. Provide incrementally more severe penalties for repeated or uncorrected deficiencies

Section 50.02 (2) (a), Stats: The department, by rule, shall develop, establish and enforce regulations and standards for the care, treatment, health, safety, rights, welfare and comfort of residents in community-based residential facilities and nursing homes and for the construction, general hygiene, maintenance and operation of those facilities which, in the light of advancing knowledge, will promote safe and adequate accommodation, care and treatment of residents in those facilities; and promulgate and enforce rules

consistent with this section. Such standards and rules shall provide that intermediate care facilities, which have 16 or fewer beds may, if exempted from meeting certain physical plant, staffing and other requirements of the federal regulations, be exempted from meeting the corresponding provisions of the department's standards and rules. The department shall consult with the department of safety and professional services when developing exemptions relating to physical plant requirements.

Section 50.098, Stats: The department shall promulgate rules establishing a fair mechanism for hearing appeals on transfers and discharges of residents from nursing homes.

c. Statutes or rules that will affect the proposed rule or be affected by it

Stats. ch. 50.

5. Estimates of the amount of time that state employees will spend to develop the rule and other necessary resources

The estimated time for state employees to develop the rule is 40 hours.

6. Description of all of the entities that may be affected by the emergency rule, including any local governmental units, businesses, economic sectors, or public utility rate payers who may reasonably be anticipated to be affected by the rule

The proposed changes are anticipated to affect nursing homes and residents and resident representatives of nursing homes.

7. Summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule

42 CFR 483.10 (e) (6) provides resident with the right to receive written notice, including the reason for the change, before the resident's room or roommate in the facility is changed.

8. Anticipated economic impact, locally or statewide

The proposed rule will have minimal or no economic impact.

Agency contacts

Mark R. Thompson, Admin. Rules Attorney
Office of Legal Counsel
(608) 266-1279
mark.thompson1@dhs.wisconsin.gov

Jackson Keuler, Admin. Rules Officer
Office of Legal Counsel
(608) 266-0387
jackson.keuler@dhs.wisconsin.gov